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DEPARTMENT OF JUSTICE

Executive Office for Immigration Review

8 CFR Part 1003

[EOIR Docket No. 177; AG Order No. 3447-2014]

RIN 1125-AA77

Designation of Temporary Immigration Judges

AGENCY: Executive Office for Immigration Review, Department of Justice.

ACTION: Interim rule with request for comments.

SUMMARY: This rule amends the Executive Office for Immigration Review (EOIR) regulations relating to the organization of the Office of the Chief Immigration Judge (OCIJ) to allow the Director of EOIR to designate or select, with the approval of the Attorney General, temporary immigration judges.

DATES: Effective date: This rule is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Written comments must be submitted on or before [INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]. Comments received by mail will be considered timely if they are postmarked on or before that date. The electronic Federal Docket Management System (FDMS) will accept comments until midnight eastern time at the end of that day.

ADDRESSES: Please submit written comments to Jeff Rosenblum, General Counsel, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2600, Falls Church, Virginia 20530. To ensure proper handling, please reference RIN No. 1125-AA77 or

EOIR docket No. 177 on your correspondence. You may submit comments electronically or view an electronic version of this interim rule at www.regulations.gov.

FOR FURTHER INFORMATION CONTACT: Jeff Rosenblum, General Counsel, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2600, Falls Church, Virginia 20530; telephone (703) 305-0470 (not a toll-free call).

SUPPLEMENTARY INFORMATION:

I. Posting of Public Comments

Please note that all comments received are considered part of the public record and made available for public inspection online at www.regulations.gov. Such information includes personally identifiable information (such as your name, address, etc.) voluntarily submitted by the commenter.

If you want to submit personally identifiable information (such as your name, address, etc.) as part of your comment, but do not want it to be posted online, you must include the phrase “PERSONALLY IDENTIFIABLE INFORMATION” in the first paragraph of your comment. You must also locate all the personally identifiable information you do not want posted online in the first paragraph of your comment and identify what information you want redacted.

If you want to submit confidential business information as part of your comment but do not want it to be posted online, you must include the phrase “CONFIDENTIAL BUSINESS INFORMATION” in the first paragraph of your comment. You must also prominently identify confidential business information to be redacted within the comment. If a comment has so much confidential business information that it cannot be

effectively redacted, all or part of that comment may not be posted on <http://www.regulations.gov>.

Personally identifiable information identified and located as set forth above will be placed in the agency's public docket file, but not posted online. Confidential business information identified and located as set forth above will not be placed in the public docket file. If you wish to inspect the agency's public docket file in person by appointment, please see the "For Further Information Contact" paragraph.

II. Background

The Executive Office for Immigration Review (EOIR) administers the nation's immigration court system. EOIR primarily decides whether foreign-born individuals who are charged by the Department of Homeland Security (DHS) with violating immigration law pursuant to the Immigration and Nationality Act (INA) should be ordered removed from the United States, or should be granted relief or protection from removal and be permitted to remain in the United States.¹ EOIR is also responsible for conducting other immigration-related adjudications, including hearings regarding custody or bond determinations made by DHS.

To make these critical determinations, EOIR's Office of the Chief Immigration Judge (OCIJ) has approximately 250 immigration judges who conduct administrative court proceedings, in 59 immigration courts nationwide. EOIR's appellate component, the Board of Immigration Appeals (Board), primarily decides appeals of immigration judge decisions. The Board is the highest administrative tribunal for interpreting and

¹ Generally, cases commence before an immigration judge when DHS files a charging document against an alien with the immigration court. *See* 8 CFR 1003.14(a).

applying U.S. immigration law. EOIR is a component of the Department of Justice (DOJ or Department).

The immigration judges are attorneys appointed by the Attorney General as administrative judges qualified to conduct the cases assigned to them. They are subject to the supervision of the Attorney General in performing their prescribed duties, but, subject to the applicable governing standards, exercise independent judgment and discretion in considering and determining the cases before them. *See* INA sec. 101(b)(4) (8 U.S.C. 1101(b)(4)); 8 CFR 1003.10(b), (d). Decisions of the immigration judges are subject to review by the Board pursuant to 8 CFR 1003.1(a)(1) and (d)(1); in turn, the Board's decisions can be reviewed by the Attorney General, as provided in 8 CFR 1003.1(g) and (h). Decisions of the Board and the Attorney General are subject to judicial review.

III. Proposal for Designation of Temporary Immigration Judges

EOIR's mission is to adjudicate immigration cases by fairly, expeditiously, and uniformly interpreting and administering the Nation's immigration laws. In order to more efficiently accomplish the agency's commitment to promptly decide the large volume of immigration cases, this rule amends the agency's regulations relating to the organization of OCIJ to allow the Director of EOIR to designate or select, with the approval of the Attorney General, one or more temporary immigration judges.

EOIR is currently managing the largest caseload the immigration court system has ever seen. Due to attrition in the immigration judge corps and continuing budgetary restrictions, the Department believes that the designation of temporary immigration

judges will provide an appropriate means of flexibility in responding to the increased challenges facing the immigration courts.

An issue of continuing concern to the Department is EOIR's pending caseload in the immigration courts. At the end of FY 2013, there were 350,330 cases pending at the immigration courts, marking an increase of 22,901 cases pending above those at the end of FY 2012. *See* 2013 EOIR STAT. Y.B. W1.² Of those, 38 percent were received prior to FY 2012. *Id.* As DHS continues its obligation to enforce the immigration laws of the United States, EOIR anticipates that its caseload will continue to increase, especially as DHS continues to use new technologies to increase efficiencies in the identification, apprehension, detention, and removal of aliens.

Even without a continually increasing caseload, the dockets currently handled by the immigration judge corps are substantial. At the end of FY 2013, 350,330 pending cases were being handled by approximately 250 immigration judges, averaging 1,401 matters per immigration judge.³ By comparison, a recent study indicated that judges for the Board of Veterans' Appeals hear approximately 700 cases each year per judge and Social Security Administration administrative law judges decide approximately 500 cases each year per judge.⁴ There is a particular need to assist EOIR's larger courts, namely New York, NY; Los Angeles, CA; San Antonio, TX; San Francisco, CA; Pearsall, TX,

² EOIR's FY2013 Statistical Year Book, prepared by EOIR's Office of Planning and Technology, is available at <http://www.justice.gov/eoir/statspub/fy13syb.pdf>.

³ This average does not take into account attrition in the immigration judge corps during FY 2013 or the difference in docket size geographically or by docket type (*i.e.*, detained, non-detained, juvenile, and institutional hearing program).

⁴ *See* American Bar Association Commission on Immigration, *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in Adjudication*, at 2-37 (February 2010).

which received 43 percent of all asylum applications (15,661) filed with the immigration courts in FY 2013. *See* 2013 EOIR STAT. Y.B. J3. EOIR must be poised to handle not only its routine workload, but also emergency or special situations, such as a sudden influx of asylum seekers.

In response to increases in immigration court workload and DOJ priorities, EOIR undertook a major initiative that resulted in the hiring of more than 50 new immigration judges during FY 2010 and through the second quarter of FY 2011. However, as of June 2014, attrition and budgetary restrictions resulted in a net increase of only 13 immigration judges since FY 2009. The Department believes that the designation of temporary immigration judges will provide an appropriate means of responding to the increasing pending caseload in the immigration courts. While the designation of temporary immigration judges is not a substitute for the ongoing need to hire additional permanent immigration judges, designation of temporary immigration judges should improve EOIR's ability to adjudicate cases in a timely manner.

OCIJ provides overall program direction, articulates policies and procedures, and establishes priorities for the immigration courts. The Chief Immigration Judge will continue to monitor caseload volume, trends, and geographic concentration and will adjust resources accordingly. Where appropriate, temporary immigration judges could be assigned to a discrete category of cases, such as motions and bond proceedings, freeing up permanent immigration judge time to adjudicate more complicated removal cases and increase the number of matters EOIR could bring to a final disposition. From FY 2009 to FY 2013, approximately 70 percent of the cases before the immigration courts were completed without the alien applying for relief from removal. Bond-related matters,

however, have increased by 12 percent from FY 2009 (51,584) to FY 2013 (57,699), along with a 104 percent increase in motions for change of venue and a 161 percent increase in case transfers over the same period. *See* 2013 EOIR STAT. Y.B. 11, A7.

However, to ensure the flexibility necessary to address record caseloads and to handle exigent circumstances, this rule would not limit the assignment of temporary immigration judges in the type of cases they may adjudicate, except as otherwise provided by the Chief Immigration Judge, per the authority granted in 8 CFR 1003.9 and in this interim rule. As discussed below, the Chief Immigration Judge will be responsible for ensuring that each temporary immigration judge has the necessary training, experience, and skills to properly adjudicate the matters assigned.

This rule amends EOIR's regulations at 8 CFR 1003.10 by adding a new paragraph (e). The amendments will allow the Director of EOIR to designate or select, with the approval of the Attorney General, former Board members, former immigration judges, administrative law judges employed within or retired from EOIR, and administrative law judges from other Executive Branch agencies to act as temporary immigration judges for renewable six-month terms. Administrative law judges from other agencies must have the consent of their agencies to be designated as temporary immigration judges. In addition, the Director of EOIR will be able to designate, with the approval of the Attorney General, attorneys who have at least 10 years of legal experience in the field of immigration law and are currently employed by the Department of Justice to act as temporary immigration judges for renewable six-month terms. The 10 years of experience must be gained after admission to the bar and may be gained through employment by the federal, state, or local government, the private sector, universities,

non-governmental organizations, or a combination of such experience. In order to allow greater flexibility, the rule does not specify particular titles or job descriptions for Department attorneys with 10 years of immigration law experience. Accordingly, attorneys at the Department with 10 years of immigration law experience may qualify for designation as temporary immigration judges.

In evaluating candidates for designation as a temporary immigration judge, EOIR anticipates that it will generally employ the same selection criteria and process it applies with respect to the hiring of permanent immigration judges. Characteristics that would qualify a candidate for designation as a temporary immigration judge include the ability to demonstrate the appropriate temperament to serve as a judge; knowledge of immigration laws and procedures; substantial litigation experience, preferably in a high-volume context; experience handling complex legal issues; experience conducting administrative hearings; and knowledge of practices and procedures. Designation of such individuals will help ensure efficiency in the adjudication of removal cases and preserve the integrity of the overall process, without sacrificing fairness and due process. As is the case for all immigration judges, EOIR provides a process for the filing and consideration of complaints.

IV. Training for Temporary Immigration Judges

Among EOIR's 2008-2013 strategic goals and objectives was the goal to provide for a workforce that is skilled, diverse, and committed to excellence, and that exhibits the highest standards of integrity. It is important that those who appear before EOIR's tribunals have trust in the agency and in the work that it does. EOIR is

committed to providing training to new and experienced immigration judges, including temporary immigration judges.

EOIR will provide the training necessary for temporary immigration judges to perform the assigned duties. The Chief Immigration Judge may choose to specify particular types of matters for which each temporary immigration judge will be assigned, consistent with the individual's training and experience. Each judge will be supervised by the Assistant Chief Immigration Judge assigned to the local immigration court where the temporary immigration judge will be assigned. The Assistant Chief Immigration Judge will be available as an additional source of assistance and guidance, and will be responsible for conducting periodic reviews of the temporary immigration judge's performance and reporting his or her findings to the Chief Immigration Judge.

EOIR also ensures that immigration judges receive continuing education. For instance, in addition to new immigration judge training, EOIR held mandatory Immigration Judge Legal Training Conferences in 2009 and 2010 and Immigration Judge Legal Training Programs in 2011, 2012, and 2013. This training covered many substantive immigration legal issues, including those relating to asylum, criminal matters, bond, adjustment of status, and a variety of other topics. The training also provided information on subjects ranging from immigration cases involving unaccompanied alien children and respondents with mental competency issues to immigration fraud and courtroom management. Immigration Judge Legal Training Programs were recorded and will be available to temporary immigration judges.

OCIJ maintains an Immigration Judge Benchbook. The Benchbook includes scripts, introductory guides, checklists, worksheets, and sample orders as well as links to

a number of immigration-related legal resources. OCIJ also maintains an Immigration Court Practice Manual, a comprehensive guide that sets forth uniform procedures, recommendations, and requirements for practice before the immigration courts. Additional resources for immigration judges are available through EOIR's virtual law library, which includes BIA decisions, circuit court decisions, regulations, and country-specific information.

Given the many training options and resources available to immigration judges, EOIR will provide training as necessary for the performance of each temporary immigration judge's assigned duties.

V. Public Comments

This rule is exempt from the usual requirements of prior notice and comment and a 30-day delay in effective date because, as an internal delegation of authority, it relates to a matter of agency organization, procedure, or practice. *See* 5 U.S.C. 553(b). The Department is nonetheless promulgating this rule as an interim rule with opportunity for post-promulgation comment. This will provide the public with an opportunity for comment before the Department issues a final rule on these matters.

VI. Regulatory Requirements

A. Regulatory Flexibility Act

Under the Regulatory Flexibility Act (RFA), “[w]henver an agency is required by section 553 of [the RFA], or any other law, to publish general notice of proposed rulemaking for any proposed rule . . . the agency shall prepare and make available for public comment an initial regulatory flexibility analysis.” 8 U.S.C. 603(a). Such analysis is not required when a rule is exempt from notice and comment rulemaking under 5

U.S.C. 553(b). Because this is a rule of internal agency organization and therefore is exempt from notice and comment rulemaking, no RFA analysis under 5 U.S.C. 603 is required for this rule.

B. Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

C. Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 804. This rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

D. Executive Order 12866 and Executive Order 13563 (Regulatory Planning and Review)

The Department has determined that this rule is not a “significant regulatory action” under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and the Office of Management and Budget has concurred in this determination. Nevertheless, the Department certifies that this regulation has been drafted in accordance with the principles of Executive Order 12866, section 1(b), and Executive Order

13563. Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits, including consideration of potential economic, environmental, public health, and safety effects, distributive impacts, and equity. The benefits of this interim rule include providing the Department with an appropriate means of responding to current and future increases or surges in the number, size, or type of immigration court matters. The public will benefit from the designation of temporary immigration judges because such designations will help EOIR better accomplish its mission of adjudicating cases in a timely manner. Temporary immigration judges will receive appropriate training and supervision for this role. This rule will not have a substantial economic impact on Department functions to the extent that individuals who may act as temporary immigration judges are already employed by the Department. The Department does not foresee any burdens to the public or the Department.

E. Executive Order 13132 (Federalism)

This rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, the Department has determined that this rule does not have sufficient federalism implications to warrant preparation of a federalism summary impact statement.

F. Executive Order 12988 (Civil Justice Reform)

This rule has been prepared in accordance with the standards in sections 3(a) and 3(b)(2) of Executive Order 12988.

G. Paperwork Reduction Act

The provisions of the Paperwork Reduction Act of 1995, Public Law 104-13, 44 U.S.C. chapter 35, and its implementing regulations, 5 CFR part 1320, do not apply to this interim rule because there are no new or revised recordkeeping or reporting requirements.

H. Congressional Review Act

This action pertains to agency management and personnel and, accordingly, is not a “rule” as that term is used by the Congressional Review Act (CRA) (Subtitle E of the Small Business Regulatory Enforcement Fairness Act (SBREFA)), 5 U.S.C. 804(3). Therefore, the reports to Congress and the Government Accountability Office specified by 5 U.S.C. 801 are not required.

List of Subjects in 8 CFR Part 1003

Administrative practice and procedure, Aliens, Immigration, Legal services, Organization and functions (Government agencies).

Accordingly, for the reasons stated in the preamble, the Attorney General amends part 1003 of chapter V of title 8 of the Code of Federal Regulations as follows:

PART 1003—EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

1. The authority citation for part 1003 continues to read as follows:

Authority: 5 U.S.C. 301; 6 U.S.C. 521; 8 U.S.C. 1101, 1103, 1154, 1155, 1158, 1182, 1226, 1229, 1229a, 1229b, 1229c, 1231, 1254a, 1255, 1324d, 1330, 1361, 1362; 28 U.S.C. 509, 510, 1746; sec. 2 Reorg. Plan No. 2 of 1950; 3 CFR, 1949–1953 Comp., p. 1002; section 203 of Pub. L. 105–100, 111 Stat. 2196–200; sections 1506 and 1510 of

Pub. L. 106–386, 114 Stat. 1527–29, 1531–32; section 1505 of Pub. L. 106–554, 114 Stat. 2763A–326 to –328.

2. Revise § 1003.10 by adding a new paragraph (e), to read as follows:

§ 1003.10 Immigration judges.

(e) *Temporary immigration judges.* (1) *Designation.* The Director is authorized to designate or select temporary immigration judges as provided in this paragraph (e).

(i) The Director may designate or select, with the approval of the Attorney General, former Board members, former immigration judges, administrative law judges employed within or retired from EOIR, and administrative law judges from other Executive Branch agencies to serve as temporary immigration judges for renewable terms not to exceed six months. Administrative law judges from other Executive Branch agencies must have the consent of their agencies to be designated as temporary immigration judges.

(ii) In addition, the Director may designate, with the approval of the Attorney General, Department of Justice attorneys with at least 10 years of legal experience in the field of immigration law to serve as temporary immigration judges for renewable terms not to exceed six months.

(2) *Authority.* A temporary immigration judge shall have the authority of an immigration judge to adjudicate assigned cases and administer immigration court matters, as provided in the immigration laws and regulations, subject to paragraph (e)(3) of this section.

(3) *Assignment of temporary immigration judges.* The Chief Immigration Judge is responsible for the overall oversight and management of the utilization of temporary immigration judges and for evaluating the results of the process. The Chief Immigration Judge shall ensure that each temporary immigration judge has received a suitable level of training to enable the temporary immigration judge to carry out the duties assigned.

July 8, 2014_
Date

James M. Cole
Deputy Attorney General

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